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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1454

HAYDEN THOMPSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 491 F. 2d 780.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1974. A petition for rehearing was denied on March 1, 1974. The petition for a writ of certiorari was filed on March 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government met its burden of proving at a pretrial hearing that all of the evidence it proposed to use at petitioners' trial had been derived

from a legitimate source, independent of petitioners' immunized testimony before a state grand jury.

2. Whether petitioners were prejudiced by the pretrial submission of federal grand jury transcripts and F.B.I. reports for *in camera* inspection by the district court.

3. Whether issues relating to the use or derivative use of prior immunized testimony can properly be resolved during the jury trial.

4. Whether, assuming some of the government's evidence is not independent of the immunized testimony, the dismissal of the indictment is the proper remedy rather than suppression of the tainted evidence.

STATEMENT

On July 31, 1970, an indictment was returned in the United States District Court for the District of North Dakota charging the First Western State Bank of Minot, North Dakota, of which petitioners were directors or shareholders, with five counts of making unlawful political contributions and expenditures, in violation of 18 U.S.C. 610 (Pet. 4, 7). Count six of the indictment charged petitioners and Gary McDaniel with conspiring to cause the bank to make the unlawful contributions, in violation of 18 U.S.C. 371 (Pet. 5; Pet. App. A-21, A-30).[1]

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[1] McDaniel, who was president of the bank, was named as a co-conspirator but not as a defendant in the indictment. He was separately indicted and convicted for embezzlement, misappropriation of funds, and making false entries in the records of a federally insured bank, in violation of 18 U.S.C. 2, 656, and 1005. These convictions were subsequently vacated and the indictments dismissed. See *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8) (Pet. App. A-62, A-76).

Petitioners moved to have the indictments quashed on the ground that each had testified before a state grand jury concerning related matters under a grant of immunity. The district court ordered a pretrial evidentiary hearing to allow the government " 'an opportunity to meet the burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources' " and not from petitioners' state grand jury testimony (Pet. A-6, A-7). Following the hearing, the district court concluded that the government's evidence failed to meet this burden and ordered that all testimony given by petitioners before the state grand jury, "or any evidence relating thereto" be suppressed (Pet. App. A-20). Upon appeal by the government, the court below reversed the district court's order of suppression and remanded the case for further proceedings.

1. A federal grand jury was convened in North Dakota commencing September 23, 1969, to investigate, *inter alia,* possible contributions by the First Western State Bank of Minot, North Dakota, some of its officers, and others, to elections of presidential or vice-presidential electors and members of Congress (Pet. App. A-5, A-6).[2] Three weeks after the federal grand jury convened, a grand jury in Ward County, North Dakota, was called into session to investigate the same alleged activities in relation to violations of the North Dakota Corrupt Practices Act, 3 N.D. Cent. Code, Sec. 16-20-01, *et seq.* The state grand jury was in session from October 14, 1969, through December 8, 1969. During that

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[2]The federal grand jury met and was in session during the following times: September 23-26, 1969; October 7-9, 1969; December 1-5, 1969; February 3-4, 1970; and July 28-31, 1970 (Pet. App. A-6).

time, each petitioner testified before the state grand jury. On December 8, 1969, that grand jury returned an indictment charging petitioners with aiding, abetting, or consenting in making unlawful political contributions in violation of 3 N.D. Cent. Code, Sec. 16-20-08. and 16-20-09 (Pet. App. A-6, A-31, A-39). However, on March 9, 1970, a North Dakota district court quashed the state indictment, because 3 N.D. Cent. Code, Sec. 16-20-10 (Pet. 5) granted transactional immunity to petitioners as a result of their testimony before the state grand jury concerning the offenses charged (Pet. App. A-6). On July 31, 1970, the federal grand jury returned the indictment that is the subject of this case, charging petitioners with conspiring to cause the bank to make illegal campaign contributions, in violation of 18 U.S.C. 610 and 371 (Pet. App. A-6).

Petitioners subsequently filed a motion in the district court to dismiss the federal indictments against them, contending that because of their testimony before the state grand jury, they were immune from federal as well as state prosecution. This motion was denied on February 3, 1971 (Pet. App. A-6). The motion was renewed on August 13, 1971, at which time petitioners requested a pretrail evidentiary hearing to take the testimony of various state and federal officals who had knowledge of the case in order to determine the extent, if any, of access and use by the federal prosecutors of petitioners' testimony before the state grand jury. In support of their motion, petitioner submitted to the court for *in camera* inspection transcripts of the testimony of each petitioner before the state grand jury. In addition, counsel for petitioner Thompson submitted an affidavit containing a list of telephone calls that were placed from the office of the State's Attorney of Ward County, North Dakota, to federal offices prior to,

during, and after the period of time that petitioners were testifying before the state grand jury. The district court then ordered an evidentiary hearing "to give the Government an opportunity to meet the burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources" (Pet. App. A-15, A-16).

The hearing was held on May 8-10, 1973. At the hearing, the United States called as witnesses the Ward County State's Attorney and the First Assistant Attorney General of North Dakota, who were the state officials who conducted the state grand jury inquiry. Also, the United States Attorney for the District of North Dakota and each of his assistants who was involved in the case testified, as well as a Department of Justice attorney who assisted in the federal grand jury inquiry and two F.B.I. agents who were involved in the investigation of the case. The essence of the government witnesses' testimony was that the federal prosecutors and investigative agents gained no knowledge of petitioners' testimony before the state grand jury from the state prosecutors and that they never had access to the transcripts of the testimony (Pet. App. A-7, A-8). The Ward County State's Attorney, Richard Thomas, testified that "there was nothing productive" from the petitioners' testimonies and said he may have indicated as much to the United States Attorney (Tr. 104, 108, 119, 134). The First Assistant Attorney General of North Dakota testified that he may have characterized petitioners' testimonies to the United States Attorney as a "denial of any knowledge of any wrongdoing," but that he did not divulge the contents of their testimony (Tr. 150, 221-223). The two F.B.I. agents stated that they had no discussions with the State's attorney concerning the grand jury testimony (Tr. 259-261, 265-266).

State's Attorney Thomas was cross-examined at length concerning numerous phone calls from his office to the Federal Building in Fargo, North Dakota, during the period from July 24, 1969 to July 13, 1970.[3] Although the records of the calls to the Federal Building indicated that they were placed to a switchboard, Thomas testified that he had no business with any government agency served by the switchboard other than the United States Attorney and possibly the Internal Revenue Service on occasion (Tr. 26, 45-46). Thomas had virtually no recollection of the subject matter of the various calls, which had occurred approximately three years earlier although he and the other government officials testified that many calls were made between the state and federal prosecutors relating to the scheduling of witnesses before the respective grand juries and the obtaining of copies of documents in the possession of the federal grand jury that the state prosecutors needed (Tr. 73-74, 150-151, 259, 432, 438, 440). Some of the conversations were not related to petitioners' case (Tr. 387, 475).

In addition to the testimony of these witnesses, the government offered for *in camera* inspection all of its F.B.I. reports and the transcripts of all federal grand jury testimony pertaining to the government's investigation of the case as evidence of the "independent" source of its evidence against petitioners (Tr. 343-347).

2. On July 16, 1973, the district court issued a Memorandum and Order in which it concluded that the government had "wholly failed" to prove that "all of the evidence it proposes to use was derived from legiti-

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[3]A list of the phone calls was admitted into evidence (Tr. 21-23). Many of the calls were made *before* the state grand jury convened on October 14, 1969 (Tr. 21-55).

mate, independent sources" (Pet. App. A-18). It ordered that any testimony given by petitioners before the state grand jury "or any evidence relating thereto" be suppressed (Pet. App. A-20). The court found that the testimony of State's Attorney Thomas relating to the telephone calls was "incredible and unworthy of belief" and that the number of telephone calls involved between the state and federal agencies "leads to the inescapable conclusion that information was conveyed to representatives of the United States Government that proscribe its use in a Federal criminal prosecution" (Pet. App. A-19). Having made this factual determination that "not all of the evidence the United States Government proposes to use was derived from legitimate, independent sources" *(ibid.)*, the court concluded:

> The herculean task of separating tainted evidence from that which is not *could never be determined* by this Court at the evidentiary hearing held herein for the basic reason that the United States did not show that all the evidence it proposes to use was derived from legitimate, independent sources. It contented itself with an *in camera* presentation which falls short of the duty imposed upon it * * *. [Emphasis added; Pet. App. A-20.]

The court of appeals reversed the judgment of the district court and remanded the case for further proceedings, holding that the district court's ruling was based upon an erroneous interpretation of *Murphy* v. *Waterfront Commission*, 378 U.S. 52, and *Kastigar* v. *United States*, 406 U.S. 441 (Pet. App. A-11).

ARGUMENT

1. Petitioners argue that the court of appeals erred in reversing the district court's "factual determination"

that the government failed to prove an independent source for its evidence, and that the court misapplied the standards set forth in *Murphy* and *Kastigar*.

We note that the court of appeals did not reverse the judgment of the district court because of any erroneous "factual" findings,[4] but rather because the district court (Pet. App. A-11) "misinterpreted the law announced in *Kastigar* and *McDaniel II*" (*United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8)). The district court, having made a factual determination that some information relating to petitioners' state grand jury testimony had been conveyed to the federal prosecutors, apparently concluded *on that basis alone* that "not all of the evidence the United States Government proposes to use was derived from legitimate, independent sources" (Pet. App. A-19). Assuming, *arguendo*, that the district court's factual determination was supported by the evidence, it was still incumbent upon that court to examine the government's independent sources (in this case, the F.B.I. reports and federal grand jury transcripts) in order to make a determination whether the government had a legitimate source of that evidence, "wholly independent of the compelled tesimony." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460.

The court below properly concluded that there is no indication that the district court examined the F.B.I. reports or federal grand jury transcripts (Pet. App. A-11), and it admittedly did not attempt to determine if they constituted an independent, legitimate source of the pro-

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[4]On appeal, the government argued that the district court's finding that federal prosecutors did have some access to the testimony of petitioners before the state grand jury was unsupported by the evidence and was "clearly erroneous." While we believe that contention does have merit on the record of this case, there is no indication that the court of appeals based its decision on such a determination.

posed evidence (Pet. App. A-20). There was obviously *some* independent evidence, since the federal grand jury had been in session seven days before the state grand jury even convened. Also, the F.B.I. investigation into the bank's illegal activities began on or about May 12, 1969, some five months prior to the convening of the state grand jury, which would indicate that the F.B.I. reports submitted for *in camera* inspection likely di reflect an independent source of some, if not all, prosecutorial evidence (Pet. App. A-5; Tr. 248-251).

Petitioners attack the decision of the court of appeals on the ground that it "seems to rely upon a different standard for the two-sovereign situation, than the single-sovereign situation" (Pet. 16). We submit that the court's opinion clearly reveals its appreciation of this Court's teachings in *Kastigar* and *Murphy*, and that no distinction is drawn between a prosecution by the immunizing sovereign and a prosecution by a second sovereign. While the court below recognized that "considerably different situations" are presented, depending on whether the prosecuting sovereign was also the immunizing sovereign, the court was obviously speaking of the differing difficulties that are encountered by the sovereigns in meeting their burden of proof in establishing an independent, legitimate source for their evidence (Pet. App. A-4)[5].

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[5]We think that different methods would clearly be required in each situation. In establishing that a non-immunizing sovereign has an independent source for its evidence, a showing of non-access to the immunized testimony would go a long way toward proving by "a preponderance of the evidence," that all of the evidence it proposes to use was derived independently of the com-

Whatever the proper means for a prosecuting sovereign to meet its burden under *Kastigar* and *Murphy*, we think the court below properly applied the teachings of those cases in remanding this case because the district court made no attempt to determine whether an independent source existed for the evidence which the government proposed to use.

2. Petitioners raise several other related contentions, all of which are without merit.

a. Petitioners' complain that the submission of the federal grand jury transcripts and F.B.I. reports for *in camera* inspection was improper because it deprived them of any opportunity to examine the material or cross-examine witnesses concerning it. Although there is some authority to support petitioners viewpoint, at least with respect to the grand jury transcripts (see *United States* v. *Dornau*, 356 F. Supp. 1091, 1097-1100 (S.D.N.Y.), reversed on other grounds, 491 F. 2d 473 (C.A. 2)), we do not think the issue merits review by this Court under

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pelled testimony. See *United States* v. *Seiffert*, 357 F. Supp. 801, 804 (S.D. Tex.), appeal pending, C.A. 5, No. 73-2148. Proof of that factor, coupled with a showing of an independent source, may well suffice to carry the government's burden of proof, at least in the pretrial stage. However, in the situation where the prosecuting sovereign is also the immunizing sovereign, proof of "non-use" becomes much more difficult, since it cannot be established by "non-access." Therefore, to establish that the evidence it proposes to use was not "tainted," it may be necessary not only to show an independent source, but to "trace" each bit of evidence back to its independent source, as was done in *United States* v. *Seiffert*, *supra*, 357 F. Supp. at 809-810.

Another approach which has been suggested is to have a court "certify" the evidence the government has available prior to compelling a witness to testify under a grant of immunity. *Goldberg* v. *United States*, 472 F. 2d 513, 516, n. 5 (C.A. 2; Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 Yale L.J. 171, 181-188 (1972).

the facts of this case. Some of the material that petitioners sought to inspect will undoubtedly be revealed to them at trial under the provisions of the Jencks Act, 18 U.S.C. 3500. At that time, they will have the opportunity to cross-examine witnesses concerning the material. To require that the government disclose the F.B.I. reports and grand jury transcripts to the petitioners before trial would result in a full-blown trial of its entire case on the merits in order to meet its burden of proving an independent, legitimate source of its evidence. Under the circumstances, we do not believe that the district court abused its discretion in refusing petitioners the right to inspect the *in camera* material, nor were petitioners improperly prejudiced by such procedure.

b. The court of appeals emphasized that it felt that the government had met its burden of proof during the pretrial stage, but it recognized that "the District Court may indeed find that proffered evidence by the Government during the forthcoming trial has only been derived from defendants' compelled testimonies * * *," in which event suppression of that evidence would be required (Pet. App. A-13). Contrary to petitioners' assertions that such procedure is improper (Pet. 16-17), we think there is merit to the court's position that "[t]he ascertaining of independent sources can often be better considered during the trial, since all the evidence is placed on the record or offered for introduction at the trial" (Pet. App. A-12).

Assuming, *arguendo*, that some of the government's evidence is "tainted," that evidence may never be used at trial, and the examination of such evidence at the pretrial stage would be a useless expenditure of time and resources for both parties, as well as the court. And even though the government may prove that all of the evidence it "proposes" to use is free of taint, it may determine during the

progress of the trial that additional evidence must be introduced, thereby again raising the issue that the pretrial hearing attempted to lay to rest.

Although petitioners argue that the resolution of this issue at the trial stage will result in numerous trial delays and interruptions, this argument is speculative. As the trial proceeds, it may become obvious that most, if not all, of the government's evidence was derived from legitimate, independent sources. The genesis of questionable evidence may be resolved by a brief *voir dire* of witnesses out of the jury's presence. In the event that frequent and prolonged hearings are anticipated or encountered, it is within the trial court's discretion to postpone evidentiary "taint" hearings until *after* the trial is concluded. The merit of such a procedure in a case such as this was pointed out in *United States* v. *Birrell,* 269 F. Supp. 716, 725-729 (S.D.N.Y.), and such a procedure was followed in *United States* v. *Nolan,* 420 F. 2d 552, 554 (C.A. 5), and *United States* v. *Sacco,* 428 F. 2d 264, 272-274 (C.A. 9).

c. Finally, petitioners argue that if any "use" of immune testimony is found to exist, the proper remedy is dismissal of the indictment, rather than suppression of the "tainted" evidence (Pet. 17-18).[6] This contention is without merit. Nothing in *Kastiger* supports such a drastic remedy. The import of that decision is that the prosecution should be allowed to proceed with its case so long as all the evidence that is used against the defendants was derived from independent, legitimate sources. Furthermore, the dismissal remedy is clearly more extreme than the remedies prescribed in analogous situations involving coerced con-

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[6]This argument is, of course, premature. Upon remand and trial, the district court may find that no use was made of the immunized testimony.

fessions and illegally seized evidence, wherein suppression of the illegally obtained evidence and the "fruits" thereof is the proper remedy, rather than dismissal of the indictment.

Nor do *United States* v. *Dornau, supra,* or *United States* v. *McDaniel, supra,* cited by petitioners, support their arguments. In both of those cases, it was established that the federal prosecutors had read transcripts of the defendants' prior immune testimony. Both cases held that because of the various *subjective* means by which the prior testimony could have been used and the impossibility of showing that such use did not occur, or showing the extent to which the immune testimony was used, dismissal of the indictment was thought to be the only feasible remedy.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1974.

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[7]Even then, in *Dornau,* only portions of the indictment were dismissed.